LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.
FILED
SEP 10 1969
JOHN F. DAVIS, CLERK

No. 451

In the Supreme Court of the United States

OCTOBER TERM, 1969

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC.,
APPELLANT

v.

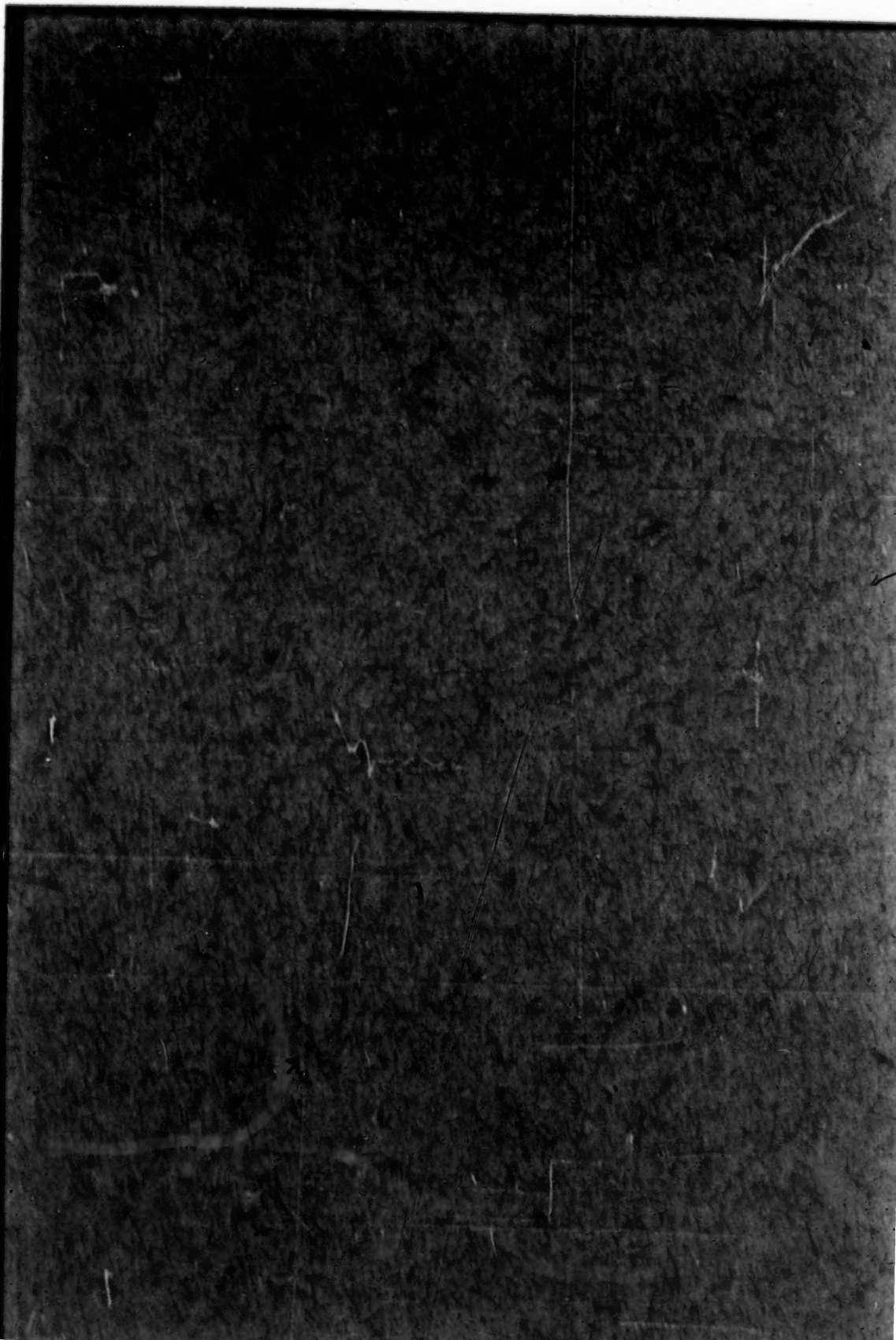
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

ERWIN N. GRISWOLD,
Solicitor General,
RICHARD W. McLAREN,
Assistant Attorney General,
GREGORY B. HOVENDON,
W. RICHARD HADDAD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

ROBERT W. GINNANE,
General Counsel,
RAYMOND M. ZIMMET,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.



In the Supreme Court of the United States

OCTOBER TERM, 1969

TRANSCONTINENTAL S.S. LINES OF CALIFORNIA, INC.,
APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(e) of the Rules of the Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three judge district court (28 U.S.C. § 1253) dismissing an action brought to set aside an order of the Interstate Commerce Commission (28 U.S.C. § 1336). The order denied appellant's application for a motor contract carrier permit, pursuant to Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b).

Organized in October 1960, appellant applied in December 1961 for authority to serve three shippers

as a contract carrier and was granted temporary authority in May 1961 (J.S. Ex. B, 1-3). By the time of the hearing on permanent authority, appellant was seeking to serve only two shippers, and by the Commission's final decision there was only a single shipper, Hoffman Brothers Packing Company, Inc., whose president is the father of appellant's president (J.S. Ex. A, 1; Ex. B, 3).

Several carriers protested the application (J.S. Ex. B, 1-3).

The hearing examiner found that neither of the two shippers under consideration at the time of the report had distinct needs which could be better met by appellant than by the protesting carriers. He noted that neither supporting shipper was familiar with the services available from existing carriers, and that Hoffman had made virtually no effort to use those services. Notwithstanding Hoffman's announced intention to go into private carriage if the application were denied (J.S. Ex. B, 13), the examiner found that protesting carriers would be adversely affected by a grant of authority, through a loss of revenue from the other shipper. He found that the applicant would not be adversely affected, except for loss of the limited amount of traffic it carried pursuant to the temporary authority. The examiner, therefore, recommended denial of the application as inconsistent with the public interest and the National transportation policy (J.S. Ex. B, 30-32).

The Commission's Review Board No. 3 adopted the examiner's report, modified to include a finding of no adverse effect on supporting shippers, and denied the application (J.S. Ex. C, 3). The Commission held that

interest. See *Interstate Commerce Commission* v. *J–T Transport Co.*, 368 U.S. 81, 88–89.

Appellant contends that since its proposed service would qualify as a contract service under subdivision (a) rather than subdivision (b) of the definition for contract service provided in Section 203(a)(15), 49 U.S.C. § 303(a)(15),[1] it should not have the burden of showing that its proposed service is designed to meet a distinct need of its supporting shipper (J.S. 16–17). In *J–T Transport Co., supra*, however, this Court held that the burden was on an applicant "to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need," see 368 U.S. at 90. Since the need of the shipping public for the proposed service is comprehended within the five factors which apply to all applications for contract service, *id.* at 88–89, there is no reason why the burden should vary according to the type of contract service contemplated. To adopt appellant's proposed distinction would be to destroy the balance among the interests of would-be contract carriers, shippers, and protesting carriers which Section 209(b) establishes. *Ibid.*

---

[1] "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (*a*) *for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of* [redacted] *person served* or (*b*) *for the furnishing of transportation services designed to meet the distinct need of each individual customer* [emphasis added]."

Appellant further contends that the Commission should have given more weight to the father's asserted intention to use private carriage if his son's application was ultimately denied (J.S. 17–18) and to the fact that appellant proposes to serve only a single shipper (J.S. 14). But there is "no room for a presumption in favor of, or against, any of the five factors on which findings must be made under § 209(b)." *J-T Transport Co., supra,* 368 U.S. at 89. The weighing of those factors was for the Commission, and the court below properly refused to substitute its judgment for the judgment of the Commission.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
GREGORY B. HOVENDON,
W. RICHARD HADDAD,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
RAYMOND M. ZIMMET,
Attorney,
Interstate Commerce Commission.

SEPTEMBER 1969.

U.S. GOVERNMENT PRINTING OFFICE 1969